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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 CENTER FOR BIOLOGICAL
9 DIVERSITY; MARICOPA AUDUBON
10 SOCIETY; and TUCSON AUDUBON
SOCIETY;

11 Plaintiffs,

12 vs.

13 PINAL COUNTY; PINAL COUNTY
14 BOARD OF SUPERVISORS; LIONEL D.
15 RUIZ; SANDIE SMITH; and DAVID
SNIDER;

16 Defendants.
17
18

Case No.:

COMPLAINT

19 Plaintiffs by and through their attorney undersigned, for their Complaint against the
20 defendants, allege as follows:

21 INTRODUCTION

22 1. This is an action brought pursuant to the Supremacy Clause of the U.S.
23 Constitution (U.S. Const. art. VI, cl. 2.), and the Clean Water Act (33 U.S.C. 1251 et
24 seq.). The Bureau of Land Management of the U.S. Department of the Interior ("BLM")
25 owns and administers a conservation easement on land including a portion of the San
26 Pedro River owned by Eric and Jean Schwennesen (the "Schwennesen Property") in
27 Pinal County, Arizona. Pinal County and the Pinal County Board of Supervisors (the
28 "County") have used the eminent domain process, in Pinal County Superior Court, to
purportedly seize a portion of the Schwennesen Property, in order to create and operate a

1 public thoroughfare on land which BLM, in exercise of its ownership interest, intends to
2 be used only as a limited-access, administrative-use and emergency-use ranch
3 vehicleway. The County's actions violate BLM's property rights. The County's actions
4 violate the Supremacy Clause of the U.S. Constitution.

5 2. Since January 31, 2008, the County has used bulldozers to create and maintain this
6 unrestricted public road within the BLM's conservation easement. These actions are
7 causing accelerating erosion of streamside soils and damage to vegetation within Critical
8 Habitat, threatening consistently occupied endangered Southwestern Willow Flycatcher
9 nest trees. In the course of creating this public thoroughfare, the County has, and
10 continues to dredge and to place imported fill in the waters of the United States without a
11 permit, in violation of section 404 of the Clean Water Act. BLM has never released its
12 restriction on use of any portion of the Property to the County. BLM has filed a formal
13 written complaint with the U.S. Army Corps of Engineers, the agency that administers
14 section 404 dredge and fill activities, that the County's activities on the Property are
15 impairing BLM's conservation easement, and are unauthorized under the Clean Water
16 Act. Plaintiff Center for Biological Diversity has also complained to the Army Corps of
17 Engineers regarding the County's violation of the Clean Water Act on the Schwennesen
18 Property and within the conservation easement. The County's actions thus violate the
19 Supremacy Clause of the United States Constitution, and the Clean Water Act. The
20 County's actions should be declared unconstitutional, unlawful, and be enjoined by this
21 Court.

22 23 JURISDICTION AND VENUE

24
25 3. This Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal
26 question jurisdiction). An actual controversy exists between the parties within the
27 meaning of 28 U.S.C. § 2201 (declaratory judgments).

1 4. Venue in this Court is proper for Relief under 28 U.S.C. § 1391(b) because the
2 challenged actions are located in Arizona. Plaintiff Center for Biological Diversity's
3 main office is located in Tucson, Arizona. Assignment to the Phoenix Division is proper
4 because the challenged activities are located in Pinal County.

5 **PARTIES**

6 5. Plaintiff Center for Biological Diversity is a non-profit corporation with over
7 40,000 members dedicated to the preservation, protection, and restoration of biodiversity
8 and ecosystems throughout the world. The Center's main office is located in Tucson,
9 Arizona. The Center works to insure the long-term health and viability of animal and
10 plant species across the United States and elsewhere, and to protect the habitat these
11 species need to survive.

12 6. Members of the Center for Biological Diversity have worked to protect the San
13 Pedro River and its wildlife since approximately 1987. The Center petitioned for
14 endangered species protection for the Southwestern Willow Flycatcher under the
15 Endangered Species Act on January 25, 1992. The Center has also worked to protect
16 other species dependent upon the San Pedro, including petitioning for protection of the
17 Sonora tiger salamander and Huachuca water umbel. Member and co-founder Dr. Robin
18 Silver has visited the area subject to BLM's conservation easement since approximately
19 1985. He will continue to return and is harmed by the ongoing actions of the Defendants.

20 7. Plaintiff Maricopa Audubon Society ("Maricopa Audubon") is an organization of
21 volunteers dedicated to the enjoyment of birds and other wildlife with a primary focus on
22 the protection and restoration of the habitat of the Southwest through education and
23 community involvement. Maricopa Audubon is a nonprofit Arizona organization with
24 approximately 2,000 members. Maricopa Audubon has a long history of involvement
25 with the San Pedro River. Maricopa Audubon's volunteers and members use, enjoy, and
26 benefit from the San Pedro River for wildlife observation, research, education, and
27 recreational activities. They intend to continue to engage in these activities in the future.
28

1 Defendants' resolution and actions in building a road has adversely affected the
2 foregoing interests of the Maricopa Audubon Society, its volunteers, and members.
3 Unless this Court grants the requested relief, these interests will continue to be adversely
4 affected and irreparably harmed by Defendants' failure to adhere to the Supremacy
5 Clause, and failure to comply with the Clean Water Act.

6 8. Plaintiff Tucson Audubon Society ("Tucson Audubon"), is a not for profit
7 501(c)(3) organization located in Tucson, Arizona. Tucson Audubon represents 4000
8 member households throughout southeastern Arizona. Tucson Audubon has partnerships
9 with private and governmental entities and works with them to conserve and protect
10 habitats where wildlife is at risk to the many factors that threaten their existence. Tucson
11 Audubon is focused on research, education, recreation, and conservation through habitat
12 protection and restoration, especially of riparian systems. Tucson Audubon members and
13 staff frequently visit and survey the site of the federal conservation easement. Tucson
14 Audubon has been instrumental in gathering scientific data to identify and protect
15 significant bird habitats as a part of an international effort known as the Important Bird
16 Area Program (IBA). IBA designation is particularly relevant to protecting critical
17 habitat utilized by birds during some part of their life cycle (breeding, feeding, nesting,
18 migrating) as well as supporting a diversity of wildlife species. The federal conservation
19 easement lies within a designated IBA in which Tucson Audubon has and continues to
20 gather scientific data and conduct ongoing research. In addition, Tucson Audubon, as
21 part of its educational commitment, conducts a twice yearly program for families to study
22 the flora and fauna of river ecology at a site adjacent to Schwennesen Property. Known
23 as the Riparian Family Institute, it hosts 24 adults and children for the overnight
24 programs. Tucson Audubon intends to continue its scientific research in this IBA for
25 many years to come. The Riparian Family Institute has been held since 1985 by Tucson
26 Audubon and it plans to continue this program in the future. These substantial interests
27 (the IBA and the RFI) of Tucson Audubon will be adversely affected if the Defendants
28

1 are permitted to open and maintain a public roadway within the BLM's contractual
2 Conservation Easement.

3 9. Defendant PINAL COUNTY, ARIZONA is a political subdivision of the State of
4 Arizona. Defendant PINAL COUNTY BOARD OF SUPERVISORS is empowered to
5 authorize and pursue eminent domain proceedings, and construct and maintain County
6 roads in Pinal County.

7 10. Defendant LIONEL D. RUIZ is a member of the Board of Supervisors of Pinal
8 County. He is sued in his official capacity.

9 11. Defendant SANDIE SMITH is a member of the Board of Supervisors of Pinal
10 County. She is sued in her official capacity.

11 12. Defendant DAVID SNIDER is a member of the Board of Supervisors of Pinal
12 County. He is sued in his official capacity.

13 **GENERAL FACTUAL ALLEGATIONS**

14 13. The San Pedro River, part of the waters of the United States and subject to the
15 Clean Water Act, originates in Mexico and flows north across the Arizona border until it
16 joins the Gila River southeast of Phoenix. It is home to one of the Southwest's most
17 precious and rare wetland ecosystems. More than 490 species of birds, mammals, fish,
18 amphibians, and reptiles reside in or near the San Pedro River, making it one of the most
19 ecologically and biologically rich places on earth. The Schwennesen Property is located
20 on the San Pedro River in a perennial, or year-round flowing, section of the river.

21 14. In evaluating the Schwennesen Property as a procurement broker for the Bureau
22 of Land Management, the Nature Conservancy's report reads as follows:

23
24 "Most experts believe that much of the original riparian
25 habitat in Arizona has been destroyed or seriously degraded during
26 the past century. Because of this loss and the importance of these
27 habitats for wildlife, public and private sectors are focusing on the
28 need to preserve the remaining riparian areas in the state. The
Arizona Chapter of the Nature Conservancy and the U.S. Bureau of
Land Management have identified the San Pedro River as the best

1 remaining example of a Southwestern river retaining a relatively
2 natural functioning ecosystem. The Conservancy has also named it
3 one of the original 12 Last Great Places and designated it a premiere
4 bioreserve project. The BLM and the Conservancy are currently
5 working with willing landowners to purchase properties or
6 Conservation Easements that provide long-term protection for
7 riparian and wildlife habitat in several core areas along the San Pedro
8 River. The Schwennesen parcel is a key tract to accomplishing
9 protection of the Dudleyville-Cook's Lake core area riparian
10 corridor...

11 Species such as the federally listed Southwestern
12 Willow Flycatcher are known to nest in the cottonwood-willow forest
13 on the property...there is presently a good presentation of several
14 tree age classes on the property indicating a vigorous, sustainable
15 riparian forest. Because seedling cottonwoods and willows are very
16 vulnerable to livestock grazing and ORV damage, important factors
17 in maintaining riparian forest condition are resting the river bottom
18 from grazing for one to two years following good tree establishment
19 seasons and protection of seedling bars from ORV damage." [See
20 "Baseline Documentation Report," Exhibit C, Dudleyville-Cook's
21 Lake (Schwennesen Tract), David B. Harris, The Nature
22 Conservancy, February 27, 1996.]

15 15. A portion of the Schwennesen Property was subjected, due to an agreement made
16 by a previous owner, George B. Gordon, to a "Temporary Highway Easement
17 Agreement" with Pinal County for a "temporary easement [for a river crossing]...until
18 the construction of a new bridge across the San Pedro River." (from Temporary
19 Highway Easement Agreement, between George B. Gordon and Pinal County, December
20 15, 1994.

21 16. Mr. Gordon entered into this temporary easement agreement with Pinal County to
22 provide the County with a temporary emergency easement until a nearby flood-damaged
23 bridge was repaired.

24 17. Original owner Gordon agreed to the temporary easement with the clearly
25 expressed reservation codified within the Temporary Easement Agreement:

26
27 "...Gordon does not want to convey fee title or a permanent easement
28 across his property, but is willing to grant Pinal County a temporary

easement for highway purposes, including a river crossing across the San Pedro River, for public use.”

18. The nearby flood-damaged bridge is the Romero Road Bridge which was damaged in January 1993.

19. The temporary emergency easement was to “be automatically extended for additional one-year periods, unless written notice is given by either party...of an intent not to renew the Agreement...Upon termination of this Agreement, Pinal shall erect barriers across the highway to close said highway to the public...”

20. In 1996 George Gordon sold the property, subject to the temporary highway easement, to Eric Schwennesen and Jean Schwennesen.

21. On March 4, 1996 a conservation easement agreement between the Nature Conservancy and Eric and Jean Schwennesen was filed with the Pinal County Recorder.

22. The conservation easement was purchased for a sum of \$140,000 and encumbered 215 acres of the Schwennesen Property.

23. The Nature Conservancy transferred the conservation easement purchased from the Schwennesens to the Bureau of Land Management , United States Department of Interior, on April 21, 1997.

24. Pinal County has never repaired the Romero Road Bridge.

25. Off road vehicle (“ORV”) use of the temporary easement for trespass access to the streambed and stream banks and resulting riparian damage have become increasingly serious problems in spite of signs posted by BLM stating “No Motor Vehicles,” and “Administrative Use Only.”

26. Efforts by Arizona Game and Fish Department law enforcement officers, Pinal County sheriff’s officers, BLM law enforcement officials, and the Schwennesens, were not able to control the ORV abuse.

27. On June 13, 2007, the Schwennesens notified Pinal County of their desire to terminate the temporary easement pursuant to the contractual option within the Temporary Highway Easement Agreement.

1 28. On December 31, 2007, pursuant to contractual provision within the Temporary
2 Highway Easement Agreement, the temporary public easement was revoked, and
3 easement reverted to use as a limited access, private ranch vehicleway, encumbered by
4 the federal conservation easement with BLM.

5 29. The Schwennesens assured access for themselves, administrative and emergency
6 vehicles via an unlocked ranch gate across the road to control the destructive ORV
7 traffic.

8 30. On January 30, 2008, Pinal County filed a Petition for Temporary Restraining
9 Order, Application for Temporary Injunction, with Notice, and Request for Order Setting
10 Hearing on Application in the Superior Court of Arizona, Division II, Pinal County,
11 Florence, seeking to take that portion of the Schwennesen Property it intended to use as a
12 public roadway, in case number CV200800276 in the Superior Court of the State of
13 Arizona for Pinal County.

14 31. According to transcribed proceedings, the Temporary Restraining Order was
15 granted in the chambers of the Judge Boyd T. Johnson, Judge of the Superior Court, with
16 Christopher W. Kramer, attorney-at-law, on behalf of Pinal County, Arizona, present.

17 32. Judge Johnson granted Pinal County authority to remove any existing
18 impediments to unrestricted transit of vehicles across the Schwennesen property and to
19 maintain the crossing in a wide open position.

20 33 Since January 31, 2007, Pinal County has utilized bulldozers, dredged and brought
21 in fill, to create an unrestricted public roadway on the Schwennesen property.

22 34. On February 6, 2008 at the Board of Supervisors meeting, Supervisor Ruiz, in his
23 official capacity, made a motion that was seconded by Supervisor Smith, in her official
24 capacity, ratifying the "emergency litigation" in state court concerning the crossing of the
25 San Pedro River and authorizing condemnation proceedings. The motion was carried by
26 unanimous vote.

1 35. On February 6, 2008, Pinal County filed a complaint in condemnation and
2 application for immediate possession.

3 36. This February 6, 2008 case was assigned case number CV200800471 in the
4 Superior Court for Arizona in Pinal County.

5 37. Named as defendants are Eric Schwennesen, Jean Schwennesen (husband and
6 wife), The Nature Conservancy, and the United States Department of Interior, Bureau of
7 Land Management.

8 38. On February 14, 2008, Pinal County petitioned and was granted by the Arizona
9 Superior Court an "Order for Immediate Possession" of the property owned by the
10 Schwennesens "for a necessary public use."

11 39. Since January 31, 2008, Pinal County has maintained an unrestricted public
12 roadway, in violation of the BLM conservation easement intending to limit crossing of
13 the San Pedro River through the Schwennesen's property to administrative and
14 emergency vehicles only.

15 40. Since January 31, 2008, Pinal County has ignored the unlocked
16 emergency/administrative ranch gate provided by the Schwennesens and has used heavy
17 equipment and brought fill into in the bed of the San Pedro River within the
18 Schwennesen Property.

19 41. Since January 31, 2008, in violation of the BLM Conservation Easement, Pinal
20 County's actions are causing accelerating erosion of streamside soils and damage to
21 vegetation within Critical Habitat threatening consistently occupied Southwestern
22 Willow Flycatcher nest trees.

23 42. Since January 31, 2008, Pinal County's actions are facilitating and promoting
24 unlimited, damaging recreational Off-Road Vehicle access to the San Pedro River,
25 causing increasing and continuing damage to the environmental quality of the
26 Schwennesen Property, in violation of the property rights of United States.

LEGAL FRAMEWORK

(The United States Constitution and The Clean Water Act)

43. Pursuant to the Supremacy Clause of the U.S. Constitution, federal statutes and regulations, as well as the policies and objectives encompassed therein, preempt conflicting state and local laws, policies, and objectives. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

44. The U.S. Congress has plenary power over federal public lands under the Property Clause of the U.S. Constitution. “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular state.” U.S. Const. art. IV, § 3, cl. 2.

45. Accordingly, when Congress chooses to exercise its jurisdiction over federal public lands or property under the Property Clause, federal statutes and regulations, orders and decisions issued pursuant to those statutes and regulations, and the policies and objectives encompassed within those statutes and regulations preempt and override any conflicting state or local laws, regulations, policies, or objectives.

46. The Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. section 1251 et seq., was first enacted in 1972. The goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” To reach that goal, Congress established a general prohibition against discharges of pollutants into waters of the United States except in compliance with various sections of the CWA. Section 404 of the CWA regulates discharges of dredged and fill material into waters of the United States. Unless specifically exempt under the Act, all discharges of dredged or fill material into jurisdictional waters must be

1 authorized by some form of a section 404 permit. Waters of the United States are
2 defined under the CWA regulations to include traditionally navigable waters and their
3 tributaries, including ephemeral washes. The San Pedro River, and in particular, the
4 year-round flowing section of the lower San Pedro River at issue here is a water of the
5 United States for purposes of CWA permitting and enforcement.

6
7 **FIRST CLAIM FOR RELIEF**

8 (Violation of the Supremacy Clause of the U.S. Constitution)

9 47. The allegations in paragraphs 1-46 are incorporated herein by reference.

10 48. Under the Supremacy Clause of the U.S. Constitution, federal statutes and
11 regulations, orders and plans issued pursuant to federal legislation, and the policies and
12 objectives contained within federal legislation preempt conflicting state and local laws,
13 policies, and objectives. U.S. Const. art. VI, cl. 2.

14 49. Pursuant to the Property Clause of the U.S. Constitution, Congress mandated that
15 BLM manage the use of its lands pursuant to the Federal Land Policy and Management
16 Act ("FLPMA.") and its implementing regulations. 43 U.S.C. § 1701 et seq.; 43 C.F.R. §
17 Part 1600. FLPMA defines "public lands" as "any land and interest in land owned by the
18 United States within the several states and administered by the Secretary of the Interior
19 through the Bureau of Land Management, without regard to how the United States
20 acquired ownership..." 43 U.S.C. § 1702(e).

21 50. Pursuant to FLPMA and its implementing regulations, the BLM obtained a
22 conservation easement on the Schwennesen Property, and restricted access to the existing
23 vehicleway on the Schwennesen Property to administrative and/or emergency vehicles
24 only.

25 51. Congress intended to preempt conflicting state and local management of the use
26 of BLM lands. Pinal County's construction of an unrestricted public road on land subject
27 to contractual federal conservation easement conflicts with federal statutes and
28

1 regulations and decisions and/or orders issued pursuant to those statutes and regulations
2 and impedes the fulfillment of the objectives and policies encompassed within the federal
3 legislation.

4 52. Pinal County's creation of an unrestricted public thoroughfare road on land
5 burdened by a BLM conservation easement, and therefore subject to the management
6 mandates of FLPMA, is preempted by federal law and violates the Supremacy Clause of
7 the U.S. Constitution, art. VI, cl. 2.

8
9 **SECOND CLAIM FOR RELIEF**

10 (Violation of the Clean Water Act)

11 53. The allegations in paragraphs 1-52 are incorporated herein by reference.

12 54. Pinal County's dredging within the streambed and placement of fill into the San
13 Pedro River, a water of the United States, without a permit, violates section 404 of the
14 Clean Water Act, 33 U.S.C. 1344.

15
16 **PRAYER FOR RELIEF**

17 A. Declare unconstitutional the Pinal County Board of Supervisors' decision to
18 initiate condemnation proceedings of a portion of the Schwennesen Property encumbered
19 by a federal conservation easement, as a violation of the property rights of the United
20 States and the Supremacy Clause;

21 B. Declare unconstitutional any actions taken by Pinal County to build a road open to
22 unrestricted vehicle use crossing the San Pedro River on the Schwennesen Property
23 subject to the BLM conservation easement. Any crossing of the encumbered property
24 should be limited to administrative and emergency use only, pursuant to federal law,
25 regulation, management plan or other decision issued pursuant to federal law;

26 C. Enjoin Pinal County from adopting resolutions, posting signs, condemning, or
27 otherwise indicating as open to unrestricted public vehicle use any portion of the
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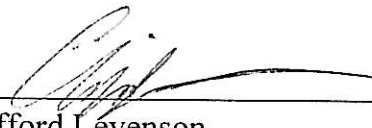
1 Schwennesen Property subject to federal law, regulation, management plan, or otherwise
2 used pursuant to federal law;

3 D. Enjoin Pinal County from creating or maintaining roadways near or through the
4 San Pedro River, or dredging within the streambed and placing any fill in the San Pedro
5 River, within the Schwennesen Property encumbered by the BLM easement, as a
6 violation of the Clean Water Act;

7 E. Grant Plaintiffs such other injunctive and declaratory relief as this Court deems
8 just and proper; and

9 F. Award Plaintiffs reasonable attorney fees, costs and expenses incurred in pursuing
10 this action as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412, the Clean
11 Water Act, 33 U.S.C. § 1365, and any other applicable law.
12

13
14 **RESPECTFULLY SUBMITTED** this 4th day of June, 2008.
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18 _____
19 Clifford Levenson
20 Attorney for Plaintiffs
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